

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

JASON SMITH,
Appellant

v.

G2-18-079

TOWN OF BILLERICA,
Respondent

Appearance for Appellant:

Joseph Sulman, Esq.
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Waltham, MA 02451

Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION

On May 8, 2018, Jason Smith (Lt. Smith), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Billerica (Town) to bypass him for promotional appointment to the position of Captain in the Town's Fire Department (BFD). On June 11, 2018, a pre-hearing conference was held at the Armand P. Mercier Community Center, 21 Salem Street, Lowell MA 01854. On August 13, 2018, I held a full hearing at the same location. The full hearing was digitally recorded and both parties

received a CD of the proceeding.¹ On October 19, 2018, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Twelve (12) exhibits were entered into evidence at the full hearing. I left the record open for the Town to provide an additional document which I received and entered as Exhibit 13. Based on the documents submitted and the testimony of the following witnesses:

For the Town:

- John Curran, Town Manager

For Lt. Smith:

- Jason Smith, Appellant;
- Billerica Firefighter Phil Tammaro
- Billerica Fire Captain Joseph Bradley

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, I find the following:

1. Mr. Curran has served as the Town Manager of Billerica for the past eight years. He previously served as Mayor of Woburn and Town Administrator in Maynard. As Town Manager, he is the Civil Service appointing authority for the Town. (Testimony of Curran).
2. Lt. Smith has been a Town firefighter/EMT for twelve years. His current rank is Lieutenant. He previously served as a firefighter in Malden for four years. He served in the U.S. Air Force from 1992 – 2014. (Testimony of Smith; Exhibit 3).

¹ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

3. In 2017, an investigation was conducted into sexual improprieties involving a female Town dispatcher and several male firefighters of varying ranks. The investigation led to findings of sexual relationships between the dispatcher and the firefighters which had been happening for several years. Allegations included sex taking place during work hours and/or on Town property. Significant discipline was imposed on the involved parties, including lengthy suspensions and demotions. (Testimony of Curran; Exhibit 6).
4. MB was not a target of the investigation. However, he is mentioned in the investigation report at page 8. As part of the report's narrative, the investigator noted that MB was a union official in 2016. The investigator stated that around or after September, 2016, the female dispatcher and two firefighters contacted MB and the Union President, in their Union roles, to discuss whether the Union could assist in the increasingly volatile situation (one of the dispatcher's former sexual partners had recently sent her a draft "Craigslis" advertisement meant to embarrass and harass her). The investigator mentioned that just because MB and the Union President were acting in their Union roles, it did not relieve them of their duty to report alleged misconduct up the chain-of-command. This was the only reference to MB in the report. (Testimony of Curran; Exhibit 6).
5. Lt. Smith was also not a target of the investigation. However, he was mentioned in the report at page 10. As part of the report's narrative, the investigator noted that Lt. Smith was a friend of the dispatcher and that he stated that one of the sexual relationships had lasted several weeks. (Testimony of Curran; Exhibit 6).
6. As stated, individuals who were directly involved received significant discipline. The investigation also revealed that many firefighters, including many superior officers of all

ranks, at least had some knowledge that multiple firefighters had been, or were actively having, sex with the female dispatcher. (Testimony of Curran).

7. In July, 2017, MB was promoted to a temporary Captain position. Lt. Smith was bypassed in that process, but did not appeal the decision. (Testimony of Curran; Testimony of Smith; Exhibit 10).
8. The instant Appeal is based on promotions in 2018 to two permanent Captain positions. Lt. Smith was bypassed by both successful candidates, including MB. (Exhibits 1, 2, 7).
9. Lt. Smith, who is not married, was friends with the female dispatcher. In December, 2016, he had multiple conversations with her, both on the telephone and in person, in which she spoke about her sexual relationships with several firefighters. (Testimony of Smith; Testimony of Curran).
10. Lt. Smith was never quite sure whether the female dispatcher's accounts were true or not, but always told her to be careful or be safe or words to that effect. (Testimony of Lt. Smith)
11. At some point, the female dispatcher introduced Lt. Smith to one of her female friends. While the female friend was over Lt. Smith's home one winter night, the female dispatcher, who was nearby, called and referenced that she had too much to drink. She ended up coming by Lt. Smith's house that night and all three of them slept in separate bedrooms. (Testimony of Lt. Smith)
12. Lt. Smith was called as a witness to testify at a disciplinary hearing for a firefighter involved in the scandal. Mr. Curran served as the hearing officer. Lt. Smith provided information about his interactions with the dispatcher during this testimony, which Mr. Curran relied on to make his bypass decision.(Curran Testimony)
13. MB was never called to testify as a witness at any disciplinary hearing. (Curran Testimony)

14. At the end of Lt. Smith's disciplinary hearing testimony, Mr. Curran attempted to ask Lt. Smith why he did not come forward with the information about the sex scandal earlier. The union attorneys' objected to the question and Mr. Curran never followed up. (Curran testimony.)
15. When the dispatcher's affairs actually occurred, the Department did not have any policy prohibiting romantic or sexual relations between members of the Department, whether of equal or unequal rank. On June 30, 2017, after the affair came to light and after Lt. Smith's first interview for the temporary captain position, the Department issued a Non-Fraternization Policy that prohibited all romantic relationships between employees of unequal rank and required employees of equal rank who were engaged in such relationships to be "professional and business-like at all times." (Ex. 8; Testimony of Curran.)
16. Mr. Curran interviewed Lt. Smith for the temporary captain position on June 28, 2017 along with the Fire Chief and several others. Along with several other questions, Mr. Curran asked Lt. Smith why he did not tell anyone about the sex scandal, whether it affected the members' work, whether he thought it would, and what Lt. Smith would do to improve morale. Lt. Smith explained that he did not believe *at the time* it had any effect on the employees' work, because he only had one person's story about the relations and he did not want to go around talking to others in the Department to ask them about activities going on outside of the Department (at the time, he did not know that some of the activities took place on Town property). (Testimony of Appellant.)
17. In response to the question about what could be done to improve morale, Lt. Smith responded that the Department needed to reestablish better connections with Town Manager,

and Mr. Curran should come over to the Department more and not be the guy behind the desk. (Testimony of Appellant)

18. On May 13, 2018, Lt. Smith received notification of his bypass for the permanent captain position. This letter is largely identical to the bypass letter issued to Lt. Smith for the temporary captain position in 2017. The letter states Lt. Smith's "actions or lack thereof during this [dispatcher scandal] provides cause for concern about your judgment and ability to serve in this essential command role." The letter also states that Lt. Smith "exercised poor judgment in allowing the young employee (dispatcher) over your house in the midst of the very troubling and problematic events for the Town and the Fire Department." The bypass letter states that Lt. Smith explained that he allowed the dispatcher to stay at his house to provide "counseling." (Ex. 2.)
19. Mr. Curran acknowledges that the primary reasons for bypassing Lt. Smith is Lt. Smith's "involvement" in the scandal and the fact that he had failed to "move on." Asked to explain what he meant by "move on," Mr. Curran testified that not enough time had passed between the bypass for the temporary promotion and the permanent position opening. He said: "I personally think he should not have put his name in. That would have shown leadership." (Testimony of Curran.)
20. Mr. Curran had also concluded that not "... enough time has passed for him to have command and respect of those he commands." (Testimony of Curran.)
21. Captain Joseph Bradley has supervised Lt. Smith for approximately two years in Engine Five in Group 4. Bradley said that it was absolutely essential that lieutenants have the respect of the firefighters under his or her command. He testified without hesitation that the firefighters in Lt. Smith's group worked well with Lt. Smith and respected Lt. Smith. When asked

directly, he denied that there was any lack of respect by any of these firefighters toward Lt. Smith since the scandal broke. He said that firefighters have never bid for shifts away from Lt. Smith. (Testimony of Bradley.)

22. Firefighter Phil Tammaro, a firefighter of 25 years in Billerica, has worked under the command of Lt. Smith and testified that he did not lose any respect for Lt. Smith after the scandal and did not observe any other firefighters lose respect for Lt. Smith. (Testimony of Tammaro.)

23. The bypass letter describes MB and his history in the Department. It does not mention that MB also received information about the dispatcher's sexual relations with other firefighters. It does not mention that MB was informed about the effect of these relations. On the contrary, it states: "*During this tenure, [MB] has continually demonstrated he understands the responsibilities and role of a commanding officer. [MB] has both expressed and demonstrated through his actions that he understands and values setting a good example that can be modeled by lower ranking firefighters . . .*" (Ex. 2) (emphasis added.)

24. Lt. Smith reviewed the rules and policy for the Employee Assistance Program (EAP) between his interview for the temporary captain position in 2017 and his interview for the permanent captain position in 2018 because Curran told him during the first interview that he needed to improve his supervision skills considering the scandal with the dispatcher. Additionally, the bypass letter for the 2017 temporary position said that Lt. Smith should have referred the dispatcher to the EAP program. At the 2018 interview, Lt. Smith told Curran that he had reviewed the EAP program's rules and policy and that it did not seem to apply to the dispatcher's situation. Curran did not dispute this at the hearing. (Ex. 10; Testimony of Appellant.)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1.

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge at 304. Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions (City of Beverly v. Civil Service Comm'n., 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n., 447 Mass. 814, 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. Beverly. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining

whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited.

Analysis

Mr. Curran bypassed Lt. Smith based on his determination that Lt. Smith showed poor judgment in his statements during the promotional interview and his overall failure to accept responsibility for, and learn from, the mistakes he made during the Fire Department’s recent “sex scandal.” In his decision, Mr. Curran wrote, part:

It is abundantly clear to me that you have still not accepted responsibility for your inadequate response to those recent events and consequently have not moved passed it. It is simply not enough to be first on the list. You must demonstrate an understanding of leadership positions and the accountability that goes with it.

This is bizarre -- for many reasons.

Lt. Smith is single. He never engaged in any sexual misconduct. Rather, he had a platonic friendship with a single female dispatcher. When that single female dispatcher told Lt. Smith of her consensual sexual encounters with male firefighters, some of whom were married, he urged her to use caution. He chose not to share the information with others, in part, to avoid spreading rumors, as he was not certain that these encounters actually occurred. Yet, the Town Manager, based on some head-scratching assumptions and conclusions, bypassed Lt. Smith for promotional appointment to permanent, full-time Fire Captain, for his “involvement” in the scandal even concluding that Lt. Smith’s mere *application* for the promotion showed a lack of leadership. As discussed in more detail below, the reasons for bypass are not valid.

First, it appears that the Town Manager has let his imagination get the best of him, focusing on the so-called late-night counseling session between Lt. Smith and the female dispatcher at Lt. Smith's home. When Lt. Smith participated in the internal investigation, he was told by the investigator that rumors were rampant about what occurred at his home that night. It was not a counseling session. It was not what the rumor mill had conjured up. It was one friend offering another friend a place to stay one night. That is not a valid reason for bypassing Lt. Smith for promotional appointment to Fire Captain.

Second, the Town has not presented any evidence to show that Lt. Smith, after being told the details of the female dispatcher's sex life, was somehow obligated to refer her to the Employee Assistance Program. Thus, failure to refer the dispatcher to the EAP program was not an "inadequate response" as alleged by the Town.

Third, at the time that the female dispatcher told Lt. Smith that she had sexual relations with male firefighters, the Fire Department had no anti-fraternization policy and, at the time, Lt. Smith had no knowledge, that those sexual encounters were having any impact on the operations or morale of the Department. Further, there was no evidence -then or now - that these encounters were not consensual. Thus, the Town has not shown that Lt. Smith's decision not to share this information with others was an "inadequate response" or a failure of leadership.

Fourth, even if Lt. Smith *was* obligated to report this information, the Town acknowledges that it promoted a lower-ranked candidate who was *also* aware of the sexual encounters and failed to properly report them.

Fifth, the decision here by the Town Manager appears to be driven, in part, by the Town Manager's misplaced expectation that Lt. Smith should personally apologize to him for his (Lt. Smith)'s alleged lack of judgment. This strikes me as some type of personal loyalty test that has no place in the civil service system.

Sixth, it is difficult to even discern what the Town Manager meant by the statement that Lt. Smith has failed to "move on" from the scandal.

Conclusion / Relief

The Town has not shown, by a preponderance of the evidence, that it had reasonable justification for bypassing him for promotional appointment to Fire Captain, in favor of other lower-ranked candidates, including MB. For this reason, Lt. Smith's appeal under Docket No. G2-18-079 is hereby ***allowed***.

That turns to the issue of the relief to be ordered here. The Commission's power of relief is derived from St. 1976, c. 534, s. 1, as amended by St. 1993, which states, in relevant part: "If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights ...".

The most common type of relief ordered by the Commission regarding bypass appeals is to order the placement of the candidate's name at the top of the next Certification to ensure reconsideration and to order a retroactive civil service seniority date, if and when the candidate is appointed. The Commission, however, has broad discretion regarding the appropriate relief to be granted based on the circumstances regarding each appeal. See Boston Police Dep't v.

Kavelski, 463 Mass. 680 (2012) (nothing in the HRD rules requires further [psychological] screening after BPD candidate had successfully appealed a psychological bypass decision); Mulhern v. Civ. Serv. Comm'n & Mass. Bay Transportation Authority, 57 Mass. App. Ct. 920 (2003) (“The remedy to be accorded a plaintiff is a matter within the commission’s discretion and will rarely be overturned”) citing Bielawski v. Personnel Administrator of the Div. of Personnel Admn., 422 Mass. 459, 464, n. 11, 465 (1996) and Thomas v. Civil Serv. Commn., 48 Mass.App.Ct. 446, 451 (2000).

I considered several factors in regard to the appropriate relief regarding this particular appeal, including the Town’s decision to appoint a lower-ranked candidate, who, according to the Town, also “failed to report” information he received about the sexual relations between the female dispatcher and male firefighters. While, based on the circumstances here, vacating the promotional appointment of MB would be warranted, I have concluded that the appropriate relief is as follows:

1. The eligible list of candidates for Fire Captain in Billerica, upon which Lt. Smith is currently ranked first, shall remain in place until such time as Lt. Smith is promoted to Fire Captain.
2. HRD shall not establish any further eligible list for Fire Captain in Billerica until such time as Lt. Smith is promoted to Fire Captain.
3. Lt. Smith shall be placed at the top of any Certification for Fire Captain in Billerica until such time as he is promoted.

4. In any future consideration of Lt. Smith for promotion to Fire Captain, the Town shall not bypass him as a result of any facts or circumstances which it had knowledge of prior to this most recent decision to bypass him.
5. No promotional appointment to Fire Captain in Billerica of any candidate ranked below Lt. Smith shall become effective until such time as: a) the Town has provided Lt. Smith with reasons for bypass; b) Lt. Smith has had the opportunity to file an appeal with the Commission; and c) the Commission has issued a final decision related to the bypass.

SO ORDERED.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein, and Tivnan, Commissioners) on December 20, 2018.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice To:

Joseph Sulman, Esq. (for Appellant)
Daniel Brown, Esq. (for Respondent)
Patrick Butler, Esq. (HRD)
Regina Caggiano (HRD)